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88-66

No. _____

FILED
JUL 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES B. COPELAND,
Petitioner

v.

PHILADELHIA POLICE DEPARTMENT
and
KEVIN TUCKER, In His Official Capacity
As Philadelphia Police Commissioner
and
WILLIAM F. REED, In His Official Capacity
As Staff Inspector For The
Philadelphia Police Department,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANDREW F. ERBA, JR. *
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QUESTION PRESENTED

Is the compelled urinalysis of a public employee nearly two months after an allegation of drug use is made and promptly retracted, and which remains uncorroborated after six weeks of investigation, reasonable at its inception as required by the Fourth Amendment?

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Petitioner, James B. Copeland, prays that this Court issue a writ of certiorari

to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered in this case on March 7, 1988, and upon which reconsideration was denied on April 5, 1988. Alternatively, since this case may be affected by two cases presently pending before the Court, National Treasury Employees v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (86-1879) and Burnley v. Railway Labor Executives Association, 839 F.2d 575 (9th Cir. 1988) (87-1555), and by a third, McKenzie v. Jones, 833 F.2d 353 (D.C. Cir. 1987) (87-1706), upon which certiorari is presently being sought, respondent respectfully requests that a writ of certiorari be granted and the case held pending the outcome of the above-named cases.

OPINIONS BELOW

The decision for the United States Court of Appeals for the Third Circuit dated March 7, 1988 is reported at 840 F.2d 1139 (3d Cir. 1988), and is reprinted and attached hereto at Appendix, A-10 - A-28. Reconsideration of that opinion was denied on April 5, 1988. Appendix, A-29. The opinion and final order of the United States District Court for the Eastern District of Pennsylvania are unreported and are reprinted and attached hereto in the Appendix, A-1 - A-9, respectively.

JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Third Circuit entered on March 7, 1988. Reconsideration of this opinion was denied by the Court of Appeals on April 5, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Facts

This case challenges the constitutional legitimacy of a urinalysis examination to which petitioner James B. Copeland was required to submit on December 9, 1985, and his subsequent discharge from the Philadelphia Police Department on the sole basis of the test results. The constitutional ramifications of drug testing by public employers have created heated debate throughout the nation over the past several years, and have sparked division among the

federal courts. This Court has granted certiorari in two such cases, National Treasury Employees Union v. Von Raab, (86-1879), and Burnley v. Railway Labor Executives Association, (87-1555). A petition for certiorari is presently pending in a third case, McKenzie v. Jones, (87-1706). In each of these cases, the issue to be decided is whether and to what extent public or quasi-public employers, citing security or safety-sensitivity of their operations, must establish some quantum of individualized suspicion before requiring their employees to subject themselves to urinalysis searches for the detection of illegal drugs. In the context of this case, on the other hand, the parties agree that the Fourth Amendment requires reasonable, individualized suspicion of drug use prior to a demand for urinalysis. The question is whether the facts which existed

at the time of the urinalysis, which established no evidence of drug use by petitioner on or off duty, satisfied this constitutional standard.

In October of 1985, as a result of an allegation by Marion Brickhouse, a police officer who had previously been involved in a romantic relationship with the petitioner, the police department began to investigate the petitioner who was a thirteen-year veteran officer. Brickhouse's allegation was made on the heels of an altercation between herself and petitioner which began when she came to his worksite and threatened to shoot him. She also said she would "get him" by telling his Captain that he was a drug user.

Several hours after the argument, Ms. Brickhouse telephoned Sergeant Edward Sasse, who supervised Mr. Copeland. She alleged that Copeland had injured her and

requested an interview with Captain Willie Williams. Sergeant Sasse had earlier concluded that Ms. Brickhouse had not been injured by petitioner. Nevertheless, he arranged for her to meet with the Captain the next day, October 18, 1985. During this interview Ms. Brickhouse, in a rambling and angry manner, accused petitioner of having used drugs in her presence some time previously. As a result of this assertion, Captain Williams forwarded a memorandum concerning it to the Internal Affairs Bureau. The investigation was commenced by Staff Inspector Reed on the sole basis of Brickhouse's allegation.

In the course of investigation six people were interviewed. When interviewed, Officer Brickhouse retracted her allegation that she had seen petitioner use drugs.

She also stated that she had never made such assertions to Captain Williams. 1/

The remainder of the investigation yielded no evidence to corroborate Brickhouse's initial statement. None of the officers interviewed indicated that they had any reason to suspect petitioner of drug use as a result of his on-duty conduct. There had been no reports from community members or fellow police officers to justify any suspicion that petitioner used or abused drugs. 2/ On December 9,

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1/ Brickhouse was subsequently disciplined for making false statements to superiors during the Copeland investigation.

2/ Petitioner had previously been investigated as part of a complaint against another officer. Although that officer was found to be a drug user, the investigation found no evidence that petitioner used drugs. Petitioner was not charged in that investigation with use or possession of drugs. Nor was he disciplined for suspected use of drugs as a result of that investigation.

1985, despite the retraction of Brickhouse's allegation, which had been made six weeks earlier, and the complete lack of evidence to substantiate it in any way since that time, Reed ordered petitioner to submit to a urinalysis examination, alleging "reasonable suspicion" that petitioner was a drug user. 3/

Six weeks later, on January 22, 1986, the laboratory reported the results of Mr. Copeland's urinalysis to the Police Department. Although the test confirmed a low-level positive result, petitioner advised Inspector Reed that he had not used drugs, and challenged the accuracy of the test. He also indicated that he had been exposed

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3/ The City has no written policy as to what constitutes reasonable suspicion or indeed, when drug tests may properly be given. This decision was left to the unfettered discretion of Staff Inspector Reed.

to marijuana smoke during the weekend just prior to the urinalysis while working at a Philadelphia hotel as a security guard, and suggested that the positive result could have been caused by passive inhalation. Inspector Reed did not investigate to determine whether passive inhalation was a possible explanation for the positive test result, or whether the test could have yielded an inaccurate result, although Reed told Captain Williams, who recommended petitioner's discharge, that he had. 4/ Reed did not offer petitioner the opportunity to take a second test, nor did he question him as to the possibility that he may be in need of drug rehabilitation.

4/ Petitioner subpoenaed the Assistant Director of the Laboratory where the urinalysis was taken to corroborate these contentions. The District Court ruled that evidence attacking the test conclusions was not relevant to the action before it. (App. at A-5, A-6).

Petitioner was accused of, inter alia, "possession of drugs", and was fired on the sole basis of the drug test. Despite his consistent efforts to seek employment, he was unable to find work for more than a year after his discharge.

Decisions Below

The District Court granted summary judgment against each of petitioner's federal claims. 5/ The Court rejected petitioner's Fourth Amendment challenges on the ground that he forfeited any expectation of privacy which he might otherwise have had in his urine "to the extent there existed reasonable suspicion of illegal drug use by him. The Court's order did not identify what factors constituted reasonable suspicion. However, in its bench

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5/ The state law claims for defamation and intentional infliction of emotional distress were withdrawn.

opinion, the Court stated that

> a report by a police officer of the commission of a crime constitutes reasonable suspicion, particularly, where the crime is alleged to have been witnessed by the police officer and where the police officer alleges that she was an intended victim or recipient of the product of the crime. The recantation occurred at the end of October. The recantation itself, coming from a police officer, is a basis for reasonable suspicion. Reasonable suspicion that she was first telling the truth and covering up a crime. It can be argued that it is just as plausible that she was telling a lie at first, on October 17, and recanting and telling the truth at the end of October.

On appeal, the Third Circuit affirmed the district court's finding of reasonable suspicion. The Court noted that reasonable suspicion must be individualized and may be affected by such factors as: 1) The nature of the tip or information; 2) The reliability of the informant; 3) The degree of corroboration; 4) Other facts contributing to suspicion or lack thereof. 840 F.2d at 1144; App. at A-16.

The Court then considered "whether the city had sufficient evidence at the time of the compelled urinalysis to support an objectively reasonable suspicion that Copeland used illegal drugs." 840 F.2d at 1144; App. at A-16. Acknowledging that "during its two month investigation the city uncovered no evidence corroborating the allegation that [petitioner] used illegal drugs, that Brickhouse recanted her accusation, that the city was aware of the emotional nature of the events that surrounded Brickhouse's statement, and [ ] the length of time between Brickhouse's accusation and the compelled urinalysis," the Court went on to conclude that

> [a]lthough events that occurred following Brickhouse's statement did not bolster the strength of the City's case against Copeland, the urinalysis was ordered on the basis of the first-hand observations of a police officer that Copeland had used illegal drugs in her presence within the previous several months. This evidence was

> sufficient to support a finding of reasonable suspicion that Copeland used illegal drugs. The time lapse and other factors do not negate this conclusion.

The Circuit Court refused to disturb its decision on review. App. at A-29.

REASONS FOR GRANTING THE WRIT

Although the drug testing debate has been waging in the press and in the lower federal courts for several years, this Court is presently considering the issue for the very first time in Von Raab and Burnley. These cases arise against a backdrop of decisional law developed by the federal courts in an effort to balance public employees' constitutionally based expectations of privacy with the public employers' need to maintain integrity, safety, and efficiency in the workforce. Except in highly unusual circumstances involving public safety or national security, the courts which have addressed

the issue have unanimously agreed that urinalysis searches must be predicated upon reasonable suspicion of drug use. 6/ Although this Court has never faced the issue squarely, the reasonable suspicion standard enunciated by the lower federal courts in the drug testing context is consistent with O'Connor v. Ortega, 480 U.S. ____, 107 S. Ct. 1492 (1987), this Court's only decision affecting workplace privacy. There, the Court held that intrusions upon a public employee's Fourth Amendment rights must be "reasonable under all the circumstances."

In Von Raab and Burnley, the Court will again assess the reasonable

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6/ Penny v. Kennedy, 648 F. Supp. 815 (E.D. Tenn. 1986), aff'd, ___ F.2d ___ (6th Cir. 1988); Burnley, supra; McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987). Cf. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986).

expectation of privacy which a public employee brings with him to his worksite. The Court will address whether and to what extent a government employer claiming safety or security-sensitivity may reasonably require urinalysis in the absence of individualized suspicion. This case, on the other hand, presents a necessary corollary to that issue. Here, the public employer concedes the burden of justifying the reasonableness of a urinalysis demand at its inception. The question is the content of that legal concept, that is, what amount of evidence the Constitution requires when that standard is applied to a particular individual.

The reasonable suspicion standard is not new to this Court. At least since Terry v. Ohio, 392 U.S. 1 (1968), it has been utilized to regulate government intrusions against individual liberty where some

exigency, such as public safety or the risk of evidentiary dissipation, makes the procuring of a search warrant impracticable. In an effort to prevent this standard from becoming a meaningless maxim, the Court has consistently warned that reasonable suspicion is not satisfied by inchoate, unspecified suspicions or inarticulate hunches. Id. at 22; Reid v. Georgia, 448 U.S. 438 (1980). Although reasonable suspicion does not require absolute certainty, specific articulable facts reasonably suggestive of wrongdoing are required before a Fourth Amendment intrusion can be allowed. New Jersey v. T.L.O., 469 U.S. 325 (1985). United States v. Cortez, 449 U.S. 411 (1981). These facts must indicate that the suspected behavior is reasonably contemporaneous with the intrusion. Terry, supra. See also O'Connor v. Ortega, 480 U.S. ___, 107 S. Ct. 1942 (1987); Delaware v.

Prouse, 440 U.S. 653 (1979). Accord United States v. Jacobsen, 466 U.S. 109 (1984) (reasonableness of an invasion of privacy must be assessed on the basis of the facts existing at the time it occurred).

Given the City's conceded lack of evidence to support a suspicion of drug use by petitioner, the Third Circuit's decision in Copeland suggests a new threshold of adequate proof, much less demanding than the analysis previously established by this Court. Given Copeland's broad applicability to other public employment settings and law enforcement contexts, the decision has serious implications for the developing law of reasonable suspicion as it relates to drug testing in the workplace, and to other Fourth Amendment contexts in which the quantum of evidence necessary to meet the reasonable suspicion standard is at issue.

If the Copeland decision stands, this Court's efforts to protect public employees and ordinary citizens from arbitrary invasions of their rights will have been in vain.

The Circuit Court's decision in Copeland threatens the law of reasonable suspicion as developed by this Court in at least two major respects. First, it sanctions a compelled urinalysis on the basis of stale information, contrary to this Court's consistent insistence that a Fourth Amendment intrusion be reasonable at its inception. O'Connor v. Ortega, supra, New Jersey v. T.L.O., supra, Terry v. Ohio, supra. Second, the Court failed to assess the reliability of the information upon which the City predicated the compelled urinalysis, thus vitiating an important step in

the reasonable suspicion analysis. 7/ Adams v. Williams, 407 U.S. at 143 (1972). See also Security & Law Enforcement Employees v. Carey, 737 F.2d 187 (2nd Cir. 1984).

This Court has never condoned a search on the basis of reasonable suspicion which was not reasonable at its inception. O'Connor, supra, Terry, supra. It is the information available to the public official at the moment of the seizure or search which controls the outcome of the reasonable suspicion analysis. Id., 392 U.S. at 22. See United States v. Pantazis, 816 F.2d 361 (8th Cir. 1987) (suspicious behavior consistent with drug courier profile

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7/ The Third Circuit recognizes that the reliability of the informant is one factor to be considered in the reasonable suspicion analysis. 840 F.2d at 1144; App. at A-16.

enhanced by deceptive answers to drug enforcement agents constituted reasonable suspicion for warrantless search and seizure).

Here, respondents had been unable, after nearly two months of investigation, to corroborate Brickhouse's initial allegation in any way and the tipster herself had recanted. If any suspicion reasonably could have existed on October 17, 1985 as a result of Brickhouse's allegation, it was dispelled as of December 9, 1985 by the retraction of the allegation and by the City's failure to corroborate it. On this basis alone, the panel's finding of reasonable suspicion is a mischaracterization of this Court's prior precedent. See Terry, supra.

Additionally, any suspicion which might have initially arisen from the allegation was dispelled by the time lapse

of nearly two months between when the allegation was made and urinalysis was demanded. The Circuit Court cursorily dismissed this factor, stating only that "[t]he time lapse . . . [did] not negate [its] conclusion." 840 F.2d at 1144; App. at A-17. The legitimacy of a Fourth Amendment intrusion has always required some reasonable proximity between the information relied upon to justify a search and the search itself. See Sgro v. United States, 287 U.S. 206 (1932). In the cases decided by this Court under the reasonable suspicion standard, the conduct which formed the basis of the Fourth Amendment intrusion has always been contemporaneous

with the search itself. 8/ This is true regardless of the context in which the case arose. See, e.g., New Jersey v. T.L.O., supra (public school students); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (border patrol searches); United States v. Place, 462 U.S. 696 (1983) (drug courier stop); Terry v. Ohio, supra (suspected criminal activity).

Finally, the Circuit Court's decision departs from the requirement of this Court, and the nearly unanimous voices of the lower federal courts, that some assessment of the reliability of the information be

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8/ Indeed, the reasonable suspicion standard developed as a response to situational exigencies which precluded compliance with the warrant requirement. In a case such as this, no such exigency existed. Even if this Court concludes that the reasonable suspicion standard is appropriate in Von Raab and Burnley, the lack of exigency exhibited by respondents may justify a more demanding standard, perhaps including a warrant, in this case.

made in a reasonable suspicion analysis. Adams v. Williams, supra, 407 U.S. at 148; Terry, supra, 392 U.S. at 30; Security Law Enforcement Employees v. Carey, 737 F.2d 187 (2nd Cir. 1984). See also Illinois v. Gates, 462 U.S. 213 (1983). Both the circumstances surrounding Ms. Brickhouse's allegation and the evidence provided to the investigators concerning her emotional condition and her character, should have satisfied respondents that her accusation, their only evidence against petitioner, was completely unreliable. In fact, while they claim to have had reasonable suspicion based upon her allegation, their own doubts about her credibility are made clear by their decision to initiate charges against her for making false statements to her superiors during the course of the investigation which was begun on the basis of her original statement. Clearly, where a

search is predicated upon information from a source of questionable reliability, and where no corroboration for such information has been found, the reasonable standard has not been satisfied.

The courts below found it was sufficient to establish Ms. Brickhouse's reliability because she was a police officer. 840 F.2d at 1144; App. at A-17. While Ms. Brickhouse's status as a police officer may have been one relevant fact to consider in assessing her credibility, it should not have been determinative. The reasonable suspicion analysis requires an evaluation of all the evidence at hand on an individual basis. The circumstances under which the allegation was made, the inconsistency of Ms. Brickhouse's subsequent statements, and her state of mind, including her alleged psychological impairment, all should have required the appellate court to

reverse the district court's summary judgment for the City.

The impact of the Copeland decision on the developing law in this area militates in favor of certiorari. No other opinion in this area has taken so bold a stance with respect to reasonable suspicion based upon the allegations of co-employees. 9/ To permit the erection of an irrebuttable presumption of the reliability of an accusing co-worker, regardless of how false, preposterous, or unsupportable their allegations, places every public employee in jeopardy of their constitutional rights and their livelihoods and reputations as well. It should be made clear by this Court that a public employer's failure to assess, at least to

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9/ The Circuit implied that the fact that Ms. Brickhouse was a police officer was sufficient to establish reliability. 840 F.2d at 1144; App. at A-17.

some minimum degree, the information upon which it predicates Fourth Amendment intrusions upon is employees cannot pass constitutional muster. Adams v. Williams, supra.

Even if the Third Circuit's approval of summary judgment was not proper as a matter of law under the circumstances just described, at the very least Brickhouse's reliability created a factual issue which was inappropriately disposed of in the context of Rule 56. There can be no question that the circumstances under which Brickhouse's allegation was made could lead a reasonable fact-finder to conclude that her statement was false and that respondents' failure to perceive it as such was unreasonable. To the extent that the allegation was unreliable, respondents had no justification whatsoever for the search, thus requiring an outcome in petitioner's favor.

CONCLUSION

For all the reasons stated herein, petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

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OCTOBER TERM, 1987

NO. _____

JAMES COPELAND,

Petitioner

v.

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Respondents

CERTIFICATE OF SERVICE

I, ANDREW F. ERBA, Jr., Esquire, as counsel for petitioner, certify that I am a member of the Bar of the Supreme Court of the United States and that three copies of the Petition for Certiorari have been served by first class United States mail,

postage prepaid, on counsel for respondents as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES B. COPELAND	:	
	:	CIVIL ACTION
v.	:	
	:	
THE PHILADEPHIA POLICE DEPARTMENT, et al.	:	NO. 86-2114

FINAL ORDER

AND NOW, this 21st day of April, 1987, for the reasons stated in the Bench Opinion on April 13, 1987, it is hereby ORDERED that pursuant to Fed. R. Civ. P. 56(b), defendant's motion for summary judgment is GRANTED as to all federal claims raised in plaintiff's complaint and the pendent state claims are marked WITHDRAWN.

1. Summary judgment shall be granted if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986).

2. The eyewitness report by a fellow police officer of criminal activity on the part of plaintiff made to a police captain was an objective basis for a reasonable suspicion for an internal affairs division investigation of plaintiff by the police department and the subsequent request that he submit to urinalysis. Recantation by the reporting officer did not eradicate reasonable suspicion justifying continuation of the investigation, of which the request for urinalysis was a part.

3. Defendant's notice of the charges against plaintiff was sufficient. Plaintiff was told that the laboratory reported a positive result for marijuana. He was given an opportunity to give an explanation. He denied use and suggested the possibility of passive inhalation. The laboratory reported that the quantity detected was inconsistent with passive inhalation.

He was then notified of his right to have an administrative hearing to determine if there was just cause for his removal from the position of police officer.

4. Under the circumstances presented, the objectively determined information warrants the grant of good faith immunity to the actions of the officials of the police department in receiving the report of the reporting officer, initiating and continuing the internal affairs investigation, requesting plaintiff to submit to urinalysis, associating the test results with him, rejecting his explanation, and suspending and then removing him from his duties and position of police officer.

5. There was no showing by plaintiff that the police department knew or reasonably believed that urinalysis was unlawful at the time plaintiff, a police officer, was caused to submit to it under the

circumstances of an eyewitness report by a fellow officer of illegal drug use. Further, there was no showing that the police department knew or reasonably believed that any mistake had been made in the urinalysis by the laboratory.

6. There was no invasion of privacy by requiring plaintiff to give a urine sample for laboratory analysis. He anticipated the possibility of being subjected to such a test following the report of his fellow officer and knew that other officers had under similar circumstances been required to submit to urinalysis as a condition of continuation of employment. Plaintiff's acceptance of the position of police officer and desire for continuation of employment constituted a surrender of the expectation of privacy in his urine to the extent there existed reasonable suspicion of illegal drug use by him.

7. Plaintiff was not denied substantive due process in not being told the specifics of the results of the urinalysis or the disciplinary consequences of a positive finding for illegal drug use. He was informed generally of the claim of misconduct and knew that he would be subject to discharge upon a positive laboratory test result.

8. Plaintiff was not denied procedural due process. He received notice of intent to remove him from the force and of his right to pursue civil service administrative remedies. He elected to challenge the removal through arbitration, an alternative dispute resolution provided in a collective bargaining agreement. That arbitration is scheduled and there is no claim that that process is unable to adjudicate the claim that the laboratory test results were unreliable, that the discharge

was without just cause and that the plaintiff should be reinstated and given full back pay.

9. Plaintiff had no protectable property interest in continuation of employment as a police officer without submission to a presumed legal urinalysis upon reasonable suspicion of illegal drug use.

10. Plaintiff cannot show that there was any publication to unauthorized persons by the police department of the reasons for his removal from the police officer position.

11. Other police officers who are white have been required to submit to urinalysis as a condition of continuation of employment upon reports by biased persons placed under arrest upon anonymous telephone reports and upon hearsay information developed through investigation reports. The sources of such reports were not fellow

police officers, a presumed reliable, lawful source of information.

12. Plaintiff's claim that he was a victim of disparate treatment because of his race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. and the equal protection clause of the fourteenth amendment of the United States Constitution is denied. Plaintiff proferred no evidence from which a prima facie case could be made; that is, he pointed to no instance where a white police officer accused of illegal drug use by a citizen or police officer, claiming to be an eyewitness, had not been subjected to urinalysis. On the other hand, the defendants profferred evidence that showed that white police officers had been similarly treated under similar circumstances, and upon positive laboratory findings, had been discharged.

13. The Police Department is making a distinction in discipline for police officers who abuse legally obtained drugs, such as alcohol (possible rehabilitation) and illegally obtained drugs, such as marijuana (automatic discharge) is rational on its face and does not violate the equal protection clause of the fourteenth amendment of the United States Constitution. By its very nature, the latter category, illegal drug abuse, involves condonation of corruption and criminal activity by the police officer, whereas alcoholism does not.

14. Plaintiff does not come within the protection of the Rehabilitation Act of 1973, 29 U.S.C. § 700. The duties of police officers do not allow for a policy

of accommodation of corruption and discharge of the public trust.

BY THE COURT:

/S/ James T. Giles
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1256

JAMES B. COPELAND,
Appellant

v.

THE PHILADELPHIA POLICE DEPARTMENT, and KEVIN TUCKER, sued in his official capacity as Police Commissioner for the City of Philadelphia, and WILLIAM REED, sued in his official capacity as Staff Inspector for the Internal Affairs Bureau of the Philadelphia Police Department

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On Appeal from the United States District Court for the Eastern District of Pennsylvania
(Civil No. 86-2114, E.D. Pa.)

Argued November 16, 1987
BEFORE: SEITZ, HUTCHINSON and ALDISERT, *Circuit Judges*.
(Filed: March 7, 1988)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Appellant James Copeland appeals from the order of the district court granting summary judgment to defendants on all of Copeland's federal claims. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

I.

We proceed to narrate the undisputed facts of record. In March 1985, Copeland, a Philadelphia policeman, had been found to be off his beat in the company of a fellow officer, who was alleged to be selling drugs and who was dismissed for the use of

illegal drugs. Copeland submitted to a urinalysis following this incident, and the results were negative. He was, however, suspended from the Philadelphia Police Department ("the department") for fifteen days because on three occasions he had been off his beat while reporting otherwise in his patrol log and once he had used his private vehicle on his beat without permission.

In October 1985, Copeland was accused by his former girlfriend Marion Brickhouse, also a police officer, of having used illegal drugs in her presence. She leveled the accusation following a heated altercation with Copeland. She made the accusation to Captain Willie Williams, Copeland's commanding officer.

In response to Brickhouse's allegation, an investigation was launched by Staff Inspector William Reed of the Internal Affairs Bureau of the department. Reed had also conducted the investigation that resulted in Copeland's previous suspension. During the first two months of the investigation no further evidence implicating Copeland in drug use was uncovered; none of the police officers interviewed indicated that they had any reason to believe that Copeland used drugs. Furthermore, Brickhouse retracted her allegation and also denied having accused Copeland. Based on this evidence, in December 1985, Copeland was ordered to submit to a urinalysis.

Copeland's urine sample was delivered to a private testing laboratory, where it was placed in an unlocked refrigerator. Three tests performed over a period of one month indicated the presence of cannabinoids (i.e., marijuana or hashish) in Copeland's urine, at levels of 75, 35, and 25 ng/ml, respectively. The laboratory report, delivered to the department, stated that these

levels were "too high to be consistent with passive inhalation."[1]

Based on these results, on January 22, 1986, Copeland was interviewed by Inspector Reed, who orally informed Copeland that he tested positive. Copeland denied using marijuana. When pressed for an explanation, Copeland offered the possibility that the positive test results were caused by passive inhalation of marijuana; Copeland stated that during the weekend immediately preceding his submitting to the urinalysis he had worked as a security guard in a Philadelphia hotel where the hallways were filled with marijuana smoke.

At the conclusion of his interview with Reed, Copeland was suspended with intent to dismiss. On January 30, 1986, Copeland received a Notice of Intention to Dismiss. Effective February 9, 1986, Copeland was discharged from the department.[2]

Copeland filed this action in the district court in April 1986, seeking reinstatement, back pay, compensatory and punitive damages, and a declaratory judgment that his constitutional rights and statutory rights had been violated. He named as defendants the

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1. The assistant laboratory director conceded in his deposition in the district court that he could not state definitively whether these results were caused by active or passive inhalation. He stated that most scientific studies indicate that levels of 20 to 30 ng/ml could be attributable to passive inhalation.

2. Prior to his dismissal, it appears that Copeland did not exercise his right under the regulations of the Civil Service Commission to notify the Police Commissioner in writing of his belief that the intended dismissal was unjustified and of the facts in support of his belief. Nor did he appeal his dismissal to the Civil Service Commission as was permitted under the Philadelphia Home Rule Charter. Copeland's arbitration proceeding under the department's collective bargaining agreement has been stayed pending the outcome of this litigation.

City of Philadelphia, Police Commissioner Kevin Tucker, and Staff Inspector William Reed (collectively "the city"). The district court granted the city's motion for summary judgment on all the federal claims and allowed the pendent state law claims to be withdrawn. The district court's decision was apparently based on the conclusion that no constitutional or statutory violations had been proved and that the individual defendants were entitled to the benefit of qualified immunity because of their good faith. This appeal followed.

II.

We are ordinarily required to address the validity of the qualified immunity defense as an initial matter, but because the qualified immunity defense is not available to a municipality, *Hynson v. City of Chester*, 827 F.2d 932, 934 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3460 (U.S. January 12, 1988), and protects government officials only from civil liability in damages, *id.*, we must, in any event, reach the merits of Copeland's claims. Therefore, we put aside the issue of the applicability of the qualified immunity defense based on the facts of this case.

On appeal, Copeland contends that factual disputes made the granting of summary judgment improper as to his claims that the city violated his federal constitutional and statutory rights in the following respects: unreasonable search and seizure; lack of procedural due process; denial of substantive due process; denial of equal protection; invasion of the liberty interest in his reputation; and failure to accord him the benefit of section 504 of the Rehabilitation Act of 1973 ("the Act"). *See* 29 U.S.C. § 794 (1982). We will address these issues seriatim.

Because the district court granted the city's motion for summary judgment, our review is plenary.

Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

A. Unreasonable Search and Seizure

Copeland contends that the district court erred in granting summary judgment to the city on his claim that the city violated his right to be free from unreasonable search and seizure as guaranteed by the fourth and fourteenth amendments by ordering him to submit to a urinalysis.[3] Copeland argues that the grant of summary judgment was inappropriate because factual disputes exist as to the propriety of the search and because the court committed legal error in finding that the search comported with the governing constitutional standard.

As noted, Copeland asserts that compulsory urinalysis under these conditions constituted a search for fourth amendment purposes. The city does not dispute that the fourth amendment is implicated by this compelled urinalysis. *See Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) (treating compulsory urinalysis examinations of jockeys as searches within the meaning of the fourth amendment). Given the nature of the search, we are satisfied that the fourth amendment is applicable.

Next, we address the propriety of this search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). Both parties agree that the proper standard for evaluating the particularized search by the department of its officer in this case is whether the department had a reasonable suspicion that Copeland was a user of illegal drugs. This standard has been applied by the

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3. Although Copeland also contends that his being compelled to submit to the urinalysis violated his right to privacy, his argument is based entirely on fourth amendment principles. Therefore, we will address his right to privacy claims within the context of our analysis of his fourth amendment arguments.

courts in a variety of contexts, including compelled urinalysis, and we deem it appropriate here. *See, e.g., id.* at 341 ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.")

The standard requires an objective evaluation of whether reasonable suspicion existed. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1503 (1987) (O'Connor, J., plurality opinion); *T.L.O.*, 469 U.S. at 341; *see also United States v. Hawkins*, 811 F.2d 210, 213 (3d Cir. 1987). The suspicion must be directed at a particular individual. *See Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979). Although the reasonable suspicion standard lacks some specificity, one court has noted that factors that may affect the reasonableness of the suspicion are "(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof." *Security & Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 205 (2d Cir. 1984)(in the context of strip searches of prison guards).

Copeland concedes that Brickhouse's accusation provided the city with sufficient cause to launch the investigation into his alleged use of drugs. He contends, however, that the city lacked reasonable suspicion to compel him to submit to the urinalysis. We therefore consider whether the city had sufficient evidence at the time of the compelled urinalysis to support an objectively reasonable suspicion that Copeland used illegal drugs. Copeland maintains that during its two-month investigation the city uncovered no evidence corroborating the allegation that he used illegal drugs, that Brickhouse recanted her accusation, that the city was aware of the emotional nature of the

events that surrounded Brickhouse's statement, and that the length of time between Brickhouse's accusation and the compelled urinalysis vitiated the evidentiary value of the accusation.

We must reject Copeland's contention. Although events that occurred following Brickhouse's statement did not bolster the strength of the city's case against Copeland, the urinalysis was ordered on the basis of the first-hand observations of a police officer that Copeland had used illegal drugs in her presence within the previous several months. This evidence was sufficient to support a finding of reasonable suspicion that Copeland used illegal drugs. The time lapse and the other factors do not negate this conclusion. Therefore, the district court did not err in granting summary judgment in favor of the city on Copeland's fourth amendment claim.[4]

B. Lack of Procedural Due Process

Copeland alleges that summary judgment was improper as to his procedural due process claim because there were disputed factual issues bearing on the reasonableness of the pretermination procedures utilized in his case. The parties agree that Copeland has a cognizable property interest in his employment sufficient to trigger the procedural due process requirements of the fourteenth amendment. Therefore, the city was required to provide Copeland with notice and an opportunity for a hearing prior to terminating his employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

In *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), we examined the procedures used by

4. In view of our conclusion, we need not consider the city's contention that justification for the search could also be based on the fact that Copeland had previously been investigated for alleged use of illegal drugs.

the Philadelphia police department in disciplining several officers implicated in police corruption and concluded that those procedures satisfied procedural due process requirements. *Gniotek* involved six police officers who were named by government witnesses during criminal trials as having received bribes. The day after each officer was named, the commanding officer of the department's Ethics Accountability Division executed a Notice of Suspension with Intent to Dismiss for each. He then summoned the officers. Each officer appeared with counsel and was interviewed individually. Each was given a form that contained a summary of the evidence against him and a recitation of *Miranda* rights.[5] Each officer declined to respond to the charges against him. Thereupon, each was given the pre-prepared suspension notice. Four days later, each officer was served with a Notice of Intention to Dismiss; this notice specified the charges against the officer and informed him of his right to submit to the police commissioner the reasons why he felt that the termination was unjustified. None took advantage of this opportunity. Each was subsequently dismissed from the department. *Gniotek*, 808 F.2d at 242-44.

Copeland asserts that the procedures afforded him were qualitatively different from those approved in *Gniotek*. He notes that he was not provided with written notice of the charges and was provided with virtually no information concerning the evidence against him other than that the urinalysis produced positive results. Copeland also observes that only at the

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5. For example, Gniotek's form stated, in relevant part: "We are questioning you concerning testimony presented in Federal Court under oath by Eugene Boris an admitted number writer, that he paid you $60 per month for an extended period beginning in 1982 for protection of his illegal activities." *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986).

conclusion of the hearing was he informed that the city intended to suspend him with intent to dismiss. Finally, he notes that the formal charges against him were not prepared until February 11, 1986, two days after he was actually dismissed. We shall discuss these arguments in order.

Before his hearing, Copeland was informed by his commanding officer that the urinalysis indicated that Copeland had used marijuana. Inspector Reed also told him of this finding during his hearing. Contrary to Copeland's contention, the due process clause can be satisfied by oral notice. *Loudermill*, 470 U.S. at 546.

Given Copeland's status as a police officer, his having submitted to a prior urinalysis, his awareness of the reason for the current test, and his being advised that he had tested positive, we think that the information provided him by the city was sufficient to fulfill the due process requirement that he be apprised of "the substance of relevant supporting evidence" against him. *Brock v. Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987). Although it might have been desirable for the city to have advised him of the specific test results appearing in the report, we cannot say that failure of the city to provide such information amounted to a constitutional violation under these circumstances.[6]

Copeland next maintains that he was denied procedural due process because he was informed of the fact that Reed intended to suspend him with intent to dismiss only at the end of the hearing rather than at its outset. This contention lacks merit. The procedure employed by the city permitted Copeland to explain the urinalysis results. Copeland did in fact present his

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6. We are not of course called upon to decide whether Copeland could demand to review the laboratory report during the course of any subsequent proceeding.

version of why the urinalysis results were positive. That Reed did not believe Copeland's explanation and issued the pre-prepared suspension notice did not violate Copeland's constitutionally protected right to due process. Moreover, in *Gniotek* the police officers were not informed of the intent to suspend them until the conclusion of their hearings. *Gniotek*, 808 F.2d at 242. We, of course, concluded that those procedures satisfied the due process clause.

Copeland asserts that the fact that the city did not prepare the formal, written charges against him until after he had been dismissed violated his right to due process by depriving him of notice and the opportunity to be heard. Before the written charges were prepared, however, Copeland was afforded notice and a hearing on what we consider to be the charge for which he was actually dismissed, i.e., use of an illegal drug.[7] The formal charge was based on the same information previously made available to Copeland, which he had the opportunity to refute. The fact that the specific charge was drafted after he had already been terminated does not constitute a violation of Copeland's right to procedural due process under the present circumstances.

We find no merit to Copeland's assertion that the post-termination procedures provided for were unduly lengthy. Copeland failed to exercise his right to appeal

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7. The formal charges also included the specification that Copeland had previously been investigated for drug use and other serious violations of department rules and had been suspended for specified violations. We note, however, that the basis for the pretermination hearing, the Notice of Intention to Dismiss, and the Notice of Dismissal, was solely the positive urinalysis test. Therefore, we think that for present purposes we need only consider issues stemming from the charge and specification that Copeland used an illegal drug.

his dismissal to the Civil Service Commission. Instead, he requested arbitration pursuant to the collective bargaining agreement between the Fraternal Order of Police and the City of Philadelphia; the arbitration hearing originally scheduled for October 1986 has been continued pending the resolution of this litigation. Based on these facts, we do not believe that the post-termination procedures available to Copeland violated any constitutional guarantee.

C. Lack of Substantive Due Process

Copeland asserts that the existence of unresolved factual questions rendered summary judgment inappropriate on his claim that the city violated his right to substantive due process. Specifically, Copeland charges that: (1) the city dismissed him based on insufficient evidence; (2) the staff investigator who conducted the investigation of Copeland misrepresented the validity of the evidence to Copeland's commanding officer; and (3) the city failed to articulate objective standards to guide decisionmaking in the context of compelled urinalysis.

The substantive component of the due process clause bars certain government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986). To determine whether a right protected by the guarantee of substantive due process has been violated, the court must "balance 'the liberty of the individual' and 'the demands of organized society.'" *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)(quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting)).

To support his claim that the city lacked sufficient evidence to dismiss him, Copeland cites the lack of security measures to safeguard the integrity of his

urine sample at the laboratory;[8] the unreliability of drug testing in general; and the assistant laboratory director's concessions in his deposition that there are possibilities for error from various sources in the testing process and that he could not definitively exclude the possibility that Copeland's urinalysis results could have been caused by passive inhalation. We do not believe, in the present context, that any alleged infirmities in the testing procedures and the reliability of the evidence so infringed Copeland's liberty as to violate his substantive due process right. As the Supreme Court has stated:

> In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 350 (1976).[9]

Copeland also argues that Inspector Reed did not investigate the possibility of errors in the test but nevertheless reported to Captain Williams that he had examined this matter. Our reading of the record does not sustain this contention. Williams asked Reed

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8. During discovery pertaining to this action, it was revealed that several employees of the laboratory had access to the refrigerator and consequently to the sample. While in the laboratory's refrigerator, the sample was not sealed.

9. Although relief is not available to Copeland under the doctrine of substantive due process, he may of course raise these allegations of the insufficiency of the evidence against him in his arbitration proceedings.

whether Copeland's test results could have been caused by passive inhalation; Reed's response was based on the information contained in the laboratory report. The record does not support the contention that Reed misrepresented to Williams the extent of his inquiries.

Finally, Copeland contends that the order compelling him to submit to the urinalysis was unconstitutionally arbitrary because the city has not articulated any objective standards governing the circumstances under which a police officer can be compelled to undergo drug testing. Whatever abstract merit there might be to Copeland's argument, we reject it in the present context because, as we have already concluded, the city applied the correct standard in compelling him to submit to the urinalysis. Although written standards would be preferable, the city's actions were not of the kind that, procedural safeguards aside, are barred by the substantive component of the due process clause.

The various allegations raised by Copeland under the rubric of substantive due process do not, either singly or in conjunction, support the conclusion that Copeland's constitutional rights were violated. Based on the record before it, the district court properly granted the city's motion for summary judgment on Copeland's substantive due process claims.

D. Denial of Equal Protection

Copeland contends that the district court committed legal error in granting the city's motion for summary judgment on his claim that the city violated his rights under the equal protection clause of the fourteenth amendment. He argues that the city treats differently police officers who are similarly situated and that the basis for this disparate treatment is not rationally related to a legitimate government interest.

Specifically, Copeland notes that police officers alleged to have violated state laws barring possession or use of certain drugs are treated more severely than officers who violate state criminal laws regarding alcohol abuse, such as public drunkenness or driving while under the influence of alcohol. He maintains that both alcohol and drug abuse are treatable illnesses and thus must be treated similarly by the city.

Copeland does not contend that drug users are a suspect class for purposes of equal protection analysis. Thus, the classification scheme Copeland challenges will withstand constitutional scrutiny if it is rationally related to a legitimate government interest.

The city concedes that it treats officers who commit drug offenses differently from those who violate alcohol abuse laws. It contends that a rational distinction exists between the two categories of officers: one group commits a criminal offense merely by possessing or using illegal drugs whereas the second group engages in an activity--the consumption of alcohol--that is not *per se* unlawful.

Because the distinction drawn by the city is being applied to law enforcement officers, we cannot say that the distinction lacks a rational basis here. Police officers are sworn to uphold the laws of the land. The city has an obvious and legitimate interest in maintaining public trust in the police department. To ensure these values, the city certainly has the authority to dismiss police officers who use illegal drugs. We therefore conclude that the city did not violate Copeland's constitutional guarantee of equal protection by treating him more severely than it treats those who violate the law by the abuse of alcoholic products.

Nor do we accept Copeland's contention based on equal protection that because both alcohol and drug

abuse are treatable illnesses the city must provide drug abusers with an opportunity to enter the same rehabilitative programs provided to alcoholics. Whatever merits this argument may have in other contexts, our equal protection analysis is unaffected by the argument that abuse of various substances may be caused by an illness.

E. Invasion of the Liberty Interest in Reputation

Copeland contends that the conduct of the city deprived him of his liberty interest in his reputation, which is protected by the due process clause of the fourteenth amendment. He argues that disputed factual matters relating to his claim made it improper for the district court to grant summary judgment.

Copeland possesses a liberty interest in his reputation that is implicated by his dismissal on the ground that he used an illegal drug. *Paul v. Davis*, 424 U.S. 693 (1976). To succeed on a claim based on this interest, Copeland must produce evidence that the reason for his termination was made public by the city. *Bishop v. Wood*, 426 U.S. at 348. Copeland has not done so. He merely alleges that the presence of information relating to his termination in his personnel file raises an inference that the city intends to communicate this information to prospective employers. He further asserts that the fact that he was unsuccessful in finding employment for more than a year after he was dismissed from the department "strengthens this inference."

Such assertions are, however, insufficient to defeat a motion for summary judgment. Copeland has thus failed to produce the evidence necessary to support his assertion that the city violated his liberty interest.

F. Failure to Accord Benefits of the Rehabilitation Act

Copeland contends that the district court erred in granting the city's motion for summary judgment on his claim that the city discriminated against him on the basis of a real or perceived handicap in violation of section 504 of the Act. *See* 29 U.S.C. § 794 (1982). Section 504 provides in relevant part:

> No otherwise qualified handicapped individual ... shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

A private right of action is created by section 504. *Strathie v. Department of Transp.*, 716 F.2d 227, 229 (3d Cir. 1983). To succeed in such a claim, an individual must prove "(1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the position sought, (3) that he was excluded from the position sought solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." *Id.* at 230. We assume, without deciding, that Copeland has offered enough evidence to support points 1, 3, and 4. We thus consider whether Copeland is otherwise qualified for the position of police officer.

To determine whether a person is otherwise qualified, our court in *Strathie* established the following standard: "A handicapped individual ... is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require ... a modification of the essential nature of the program ...." *Id.* at 231; *see also School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, 1131 n.17 (1987).

Copeland asserts that the Act permits analysis only of whether accommodation of physical handicaps is possible, that is, that the examination of "moral" qualifications is beyond the scope of the Act. He argues that his thirteen year service record proves that he satisfies the requirement that he "can perform 'the essential functions' of the job in question." *Arline*, 107 S. Ct. at 1131 n.17 (quoting 45 C.F.R. § 84.3(k)). Because the police department assigns police officers who are alcoholics or who are found to have violated state laws regarding alcohol abuse (e.g., public drunkenness, driving while intoxicated) to a police department-operated rehabilitation program, Copeland argues by way of analogy that reasonable accommodation of his handicap is possible.

The city and the United States as *amicus* assert that the statutory construction advanced by Copeland is unduly narrow. They contend that the phrase "otherwise qualified" permits analysis of whether accommodation is possible in light of all aspects of the job, not merely its physical requirements. They assert that the very nature of the job requires that a police officer not engage in unlawful behavior because it is a police officer's duty to enforce the laws.

We conclude that accommodating a drug user within the ranks of the police department would constitute a "substantial modification" of the essential functions of the police department and would cast doubt upon the integrity of the police force. No rehabilitation program can alter the fact that a police officer violates the laws he is sworn to enforce by the very act of using illegal drugs.

Because a police department is justified in concluding that it cannot properly accommodate a user of illegal drugs within its ranks, we conclude that Copeland is not otherwise qualified for the position and thus does not qualify for the protections afforded

by the Act. Therefore, the district court properly granted the city's motion for summary judgment on Copeland's claim that his dismissal violated the provisions of the Act.

III.

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1256

JAMES E. COPELAND,
Appellant

v.

THE PHILADELPHIA POLICE DEPARTMENT,
et al.

(Civil Action No. 86-2214 - E.D. Pa.)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, HUTCHINSON, SCIRICA, COWEN and ALDISERT, Circuit Judges.

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

/s/ Collins J. Seitz
Circuit Judge

DATED: April 5, 1988